

No. 85-6725

Supreme Court, U.S.  
**FILED**  
**MAR 11 1987**  
JOSEPH F. SPANIO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

WILLIAM J. BOURJAILY, *Petitioner*,  
v.  
UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States  
Court Of Appeals For The Sixth Circuit

**REPLY BRIEF FOR PETITIONER**

JAMES R. WILLIS  
(*Counsel of Record*)  
Suite 610, Bond Court Building  
1300 East Ninth Street  
Cleveland, OH 44114  
(216) 523-1100

JAMES M. SHELL  
SHELL, SHELL & GLYNN, S.C.  
222 East Mason Street  
Milwaukee, WI 53202  
(414) 271-8535

STEPHEN ALLAN SALTZBURG  
University of Virginia  
School of Law  
Charlottesville, VA 22901  
(804) 924-3520  
*Counsel for Petitioner*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	2
I. THE GOVERNMENT MUST PROVE THE EXISTENCE OF A CONSPIRACY AND THE MEMBERSHIP OF THE DECLARANT AND THE DEFENDANT BY A PRE- PONDERANCE OF THE INDEPENDENT EVIDENCE .....	2
A. Respondent's Claim That At Common Law Federal Judges Did Not Determine The Admissibility Of Co-Conspirator Statements Is Incorrect .....	2
B. The Advisory Committee Believed That It Cod- ified Pre-Existing Law, And The Lower Courts Have Correctly Interpreted The Legislative History .....	6
C. The Rule Against Bootstrapping Is A Neces- sary Protection For The Defendant .....	9
II. STATEMENTS ADMITTED UNDER THE CO-CON- SPIRATOR RULE SHOULD PRESUMPTIVELY SAT- ISFY THE CONFRONTATION CLAUSE PROVIDED THERE IS PROOF <i>ALIUNDE</i> OF CONSPIRACY, BUT UNIQUE CIRCUMSTANCES MAY WARRANT A CON- FRONTATION ANALYSIS .....	11
A. The Advisory Committee Expressly Left Open Confrontation Clause Attacks Upon Hearsay, And Congress Recognized This When It Adopted The Federal Rules Of Evidence ....	11
B. The Co-Conspirator Rule In Its Current Form Is Very Different From The Rule Originally Adopted And Respondent Would Have The Court Broaden The Rule Once More .....	12
C. Respondent Has Exaggerated A Defendant's Opportunity To Impeach A Co-Conspirator And The Burden Of Permitting A Limited Con- frontation Clause Analysis Of Co-Conspirator Statements .....	15
CONCLUSION.....	17

## TABLE OF AUTHORITIES

	Page
<i>Carbo v. United States</i> , 314 F.2d 718 (9th Cir. 1963), <i>cert. denied</i> , 377 U.S. 953 (1964) .....	4, 7
<i>Dennis v. United States</i> , 183 F.2d 201 (1950), <i>aff'd</i> , 341 U.S. 494 (1951) .....	4
<i>Glasser v. United States</i> , 315 U.S. 60 (1942) .....	2, 6-7
<i>Government of Virgin Islands v. Braithwaite</i> , 782 F.2d 399 (3d Cir. 1986) .....	14
<i>Jackson v. Denno</i> , 378 U.S. 368 (1964) .....	4-6
<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946) .....	13
<i>Krulewitch v. United States</i> , 336 U.S. 440 (1949) .....	12-13
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946) .....	13
<i>United States v. Ammar</i> , 714 F.2d 238 (3d Cir.), <i>cert. denied</i> , 464 U.S. 936 (1983) .....	14-15
<i>United States v. Drougas</i> , 748 F.2d 8 (1st Cir. 1984) .....	6
<i>United States v. Georgia Waste Systems, Inc.</i> , 731 F.2d 1580 (11th Cir. 1984) .....	16
<i>United States v. Gotti</i> , 644 F.Supp. 370 (E.D.N.Y. 1986) .....	13
<i>United States v. Inadi</i> , — U.S. —, 106 S.Ct. 1121 (1986) .....	15-16
<i>United States v. Liefer</i> , 778 F.2d 1236 (7th Cir. 1985) .....	14
<i>United States v. Lutwak</i> , 195 F.2d 748 (1952), <i>aff'd</i> , 344 U.S. 604 (1953) .....	4
<i>United States v. Mastropieri</i> , 685 F.2d 776 (2d Cir.), <i>cert. denied</i> , 459 U.S. 945 (1982) .....	6
<i>United States v. Moosey</i> , 735 F.2d 633 (1st Cir. 1984) .....	13
<i>United States v. Mouzin</i> , 785 F.2d 682 (9th Cir. 1986) .....	16
<i>United States v. Ordonez</i> , 737 F.2d 793 (9th Cir. 1984) .....	16
<i>United States v. Womochil</i> , 778 F.2d 1311 (8th Cir. 1985) .....	14
<i>Zenith Radio Corp. Matsushita Elec. Indus. Co.</i> , 723 F.2d 238 (3d Cir. 1983), <i>rev'd on other grounds</i> , — U.S. —, 106 S.Ct. 1348 (1986) .....	13

## CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const., Amend. VI .....	11-17
------------------------------	-------

## RULES OF COURT:

Fed. R. Evid. 104(a),(e) .....	6
Fed. R. Evid. 608(b) .....	15

## Table of Authorities Continued

	Page
Fed. R. Evid. 801(d)(2)(E) .....	<i>passim</i>
Fed. R. Evid. 803 .....	7, 11
Fed. R. Evid. 804 .....	7, 11-12
Fed. R. Evid. 806 .....	15

## MISCELLANEOUS:

ABA Litigation Section, American Evidence Law, Chapter 56, at 43 (forthcoming 1987) .....	9
Advisory Committee's Note to Fed. R. Evid. 801, 56 F.R.D. 297, 299 .....	6-7
Advisory Committee's Special Introductory Note to Article VIII, 56 F.R.D. 288-92 .....	11
ALI, Model Code of Evidence (1942), Comment to Rule 11, at 88, Comment to Rule 508, at 249-50 .....	4
ALI Restatement of the Law of Agency Second (1958). Comment, 20 U. Chi. L. Rev. 313 (1953) .....	8, 10
E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 20.06 (3d ed. 1977) .....	4
Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess. ....	5
Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. ....	7
McCormick, The Procedure of Admitting and Excluding Evidence, 31 Tex. L. Rev. 128 (1952) .....	7, 12
Morgan & Maguire, Looking Backward and Forward at Evidence, 1886-1936, 50 Harv. L. Rev. 909 (1937) ..	3, 4
1 J. Wigmore, Evidence in Trials at the Common Law § 17, at 770 (Tillers rev. 1983) .....	3
1 J. Wigmore, Evidence in Trials at the Common Law § 216, at 717 & n.4 (3d ed. 1940) .....	3

## SUMMARY OF THE ARGUMENT

Respondent contends that a finding that a defendant was a conspirator along with a hearsay declarant may be based wholly or partly on the declarant's out-of-court statements, notwithstanding the fact that the defendant may have no opportunity to cross-examine or to confront the declarant. Respondent's argument turns entirely upon its assertion that this Court's approach to co-conspirator statements prior to the adoption of the Federal Rules of Evidence assumed that a trial judge would not decide the admissibility of co-conspirator statements. This assertion is demonstrably false, leaving respondent's argument without a foundation.

Respondent also contends that Rule 801(d)(2)(E) broadened the admissibility of co-conspirator statements. The legislative history of the Federal Rules of Evidence indicates, however, that the opposite is true. The Advisory Committee determined that it would not classify co-conspirator statements as exceptions to the hearsay rule, because such statements were not reliable enough to be so classified, and it expressly declined to expand the scope of the rule. Respondent's further contention with respect to the Advisory Committee's and the Congress's approach to the Confrontation Clause is similarly contradicted by the legislative history of the Federal Rules of Evidence. The Advisory Committee stated in its work product and directly to Congress that it was not seeking to resolve confrontation problems in formulating its hearsay rules.

Respondent's argument that co-conspirator statements represent a firmly rooted hearsay exception fails to recognize that the scope of the co-conspirator rule today is broader than anyone could possibly have imagined when the co-conspirator rule was first adopted. Also, the posi-

tions taken by respondent in other cases and the limitations on impeachment in the Federal Rules of Evidence frequently make it impossible for a defendant against whom co-conspirator statements are offered to impeach the declarant.<sup>1</sup>

Respondent's arguments with respect to preliminary fact finding and the Confrontation Clause are self-contradictory. Respondent argues that this Court should depart from the firmly rooted approach of *Glasser v. United States*, 315 U.S. 60 (1942), and simultaneously that the Court should bar all federal courts from entertaining any Confrontation Clause attack on the admissibility of co-conspirator statements. Surely, respondent cannot have it both ways. It cannot maintain that an approach to hearsay that has previously not been recognized as valid is a long-standing rule of sufficient pedigree to immunize the approach from the Sixth Amendment.

### ARGUMENT

#### I. THE GOVERNMENT MUST PROVE THE EXISTENCE OF A CONSPIRACY AND THE MEMBERSHIP OF THE DECLARANT AND THE DEFENDANT BY A PREPONDERANCE OF THE INDEPENDENT EVIDENCE

##### A. Respondent's Claim That At Common Law Federal Judges Did Not Determine The Admissibility Of Co-Conspirator Statements Is Incorrect

Respondent's argument that a trial judge may rely, wholly or in part, upon the contents of the very statements to which objection is made in finding that a defend-

<sup>1</sup> Furthermore, respondent fails to recognize that at common law defendants often had protections against the introduction of unreliable co-conspirator statements that are not provided under the Federal Rules of Evidence. These are discussed *infra*, at 4-5.

ant was a co-conspirator of the declarant is premised upon the following assertion: "At the time the bootstrapping rule developed, the task of determining the admissibility of co-conspirator declarations was routinely assigned to juries, not to judges." Brief for Respondent, at 10.<sup>2</sup> No citation accompanies this assertion, and it is belied by all of the available evidence.

For the longest time, distinguished writers on evidence pointed out that the "orthodox rule" was that judges would determine the admissibility of evidence, making necessary findings in the process, and that the admissibility of conspirator statements was a typical determination for the judge. Dean Wigmore, for example, observed that preliminary fact finding was for the trial judge and that a preponderance of the evidence standard should govern such fact finding.<sup>3</sup> Professors Morgan & Maguire referred to the judge's role as the original, orthodox rule.<sup>4</sup> Professor McCormick observed that the judge was to engage in preliminary fact finding when making admissibility decisions.<sup>5</sup> When the American Law Institute promulgated its Model Code of Evidence in 1942, with Professor Morgan as its reporter, the Code plainly stated that the common law practice was for the trial judge to determine the facts needed to decide on

<sup>2</sup> The same point is made several times in respondent's brief. See, e.g., pages 6, 11, 18.

<sup>3</sup> See 1 J. Wigmore, *Evidence in Trials at the Common Law* § 17, at 770 (Tillers rev. 1983). See also 1 Wigmore § 216, at 717 & n.4 (3d ed. 1940).

<sup>4</sup> Morgan & Maguire, *Looking Backward and Forward at Evidence, 1886-1936*, 50 Harv. L. Rev. 909, 918 (1937).

<sup>5</sup> McCormick, *The Procedure of Admitting and Excluding Evidence*, 31 Tex. L. Rev. 128, 143 (1952).

admissibility and that the judge traditionally made the findings associated with vicarious admissions.<sup>6</sup>

This writing was not lost on the courts. Judge Learned Hand wrote in one of the most frequently cited pre-Federal Rules of Evidence decisions, *Dennis v. United States*, 183 F.2d 201, 230-31 (1950), *aff'd*, 341 U.S. 494 (1951), that the decision on admissibility of co-conspirator statements was for the judge. Another frequently cited case, *Carbo v. United States*, 314 F.2d 718, 737 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964), reiterated the *Dennis* holding and the proposition that the judge's role was the orthodox, standard common law role.

Many trial judges, concerned for the protection of the defendant, added a level of protection to the orthodox approach and instructed juries not to rely upon co-conspirator statements unless they first concluded *beyond a reasonable doubt* that a conspiracy had been proved involving the declarant and the defendant. This was a second level protection, because it was relevant only after the trial judge found a statement to be admissible. Commentators observed the phenomenon and described it as signifying a "tenderness" for the accused.<sup>7</sup>

This Court discussed preliminary fact finding at length in *Jackson v. Denno*, 378 U.S. 368 (1964). *Jackson* involved confessions, not co-conspirator statements, but

<sup>6</sup> ALI, Model Code of Evidence (1942), Comment to Rule 11, at 88, Comment to Rule 508, at 249-50. Student law review notes also demonstrated an understanding that at common law the rule was that the judge would determine the admissibility of evidence. *See, e.g.*, Comment, 20 U. Chi. L. Rev. 313 (1953), discussing *United States v. Lutwak*, 195 F.2d 748 (1952), *aff'd*, 344 U.S. 604 (1953).

<sup>7</sup> *See McCormick, supra* note 5 at 143 n.78, specifically citing the approach of some courts to conspirator statements as an example.

the parties to the instant case have agreed that the basic approach to preliminary fact finding is similar for both. Justice White's majority opinion described the orthodox approach discussed above, the New York rule, and the Massachusetts rule. *Id.* at 377-91.<sup>8</sup> The Court held unconstitutional the New York approach while it expressly "raise[d] no question here concerning the Massachusetts procedure." *Id.* at 378 n.8. An appendix to the majority opinion indicated that the overwhelming majority of federal courts followed either the orthodox or the Massachusetts approach. *Id.* at 399-400.<sup>9</sup>

*Jackson* recognized the orthodox rule that the trial judge was required to find facts in ruling on the

<sup>8</sup> New York assigned the bulk of the task of determining the voluntariness of a confession to the jury, with the trial judge excluding a confession only if in no circumstances could it be deemed voluntary. *Id.* at 377. The jury was required to find a confession to be voluntary before relying upon it as evidence. Massachusetts required the trial judge to engage in preliminary fact finding, but followed the "tenderness" approach in asking a jury also to consider the voluntariness of any confession that was admitted.

<sup>9</sup> In his dissenting opinion, Justice Black argued that a jury had a right to hear and determine the voluntariness of a confession. *Id.* at 401 (Black, J., dissenting). He stated that "[t]he New York rule does now and apparently always has put on the State the burden of convincing the jury beyond a reasonable doubt that a confession is voluntary," and argued that proof beyond a reasonable doubt should be required of the preliminary fact. *Id.* at 405 (Black, J. dissenting). Justice Harlan did not express a view on the standard of proof that should be required in his dissent.

The standard federal charge, used by trial judges who provided a second level of protection by adopting the "tenderness" approach, adopted the standard of proof advocated by Justice Black in *Jackson*, by requiring the jury to find beyond a reasonable doubt the existence of a conspiracy that included the defendant before using co-conspirator statements against that defendant. *See E. Devitt & C. Blackmar, Federal Jury Practice and Instructions* § 20.06 (3d ed. 1977).

admissibility of a variety of evidence, including co-conspirator statements, and did not disturb the second level of protection that some courts had added. But, Fed. R. Evid. 104(a) made no provision for reconsideration of preliminary questions of fact by a jury. Instead, Fed. R. Evid. (104)(e) provided that once the judge determined that evidence was admissible, a party who had objected could offer other evidence "relevant to weight or credibility." Thus, the federal circuits uniformly held that a defendant was not entitled to have a jury instructed that it may reconsider a determination made by the judge in ruling on the admissibility of evidence. *See, e.g., United States v. Drougas*, 748 F.2d 8 (1st Cir. 1984); *United States v. Mastropieri*, 685 F.2d 776 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982).

This history establishes that during the entire period in which this Court and the lower courts required proof *aliunde* and relied upon *Glasser*, it was well understood that the trial judge bore the burden of making a determination of the admissibility of co-conspirator statements and the determination would be made on the basis of independent evidence.

**B. The Advisory Committee Believed That It Codified Pre-Existing Law And Adopted The Traditional Agency Approach, And The Lower Courts Have Correctly Interpreted The Legislative History**

In its discussion of the co-conspirator rule, the Advisory Committee specifically stated that "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." 56 F.R.D. at 299. No clearer statement could have been made to establish that the Committee did not intend to expand admissibility of this form of evidence. Moreover, the Advisory Committee explained its

decision to place admissions in Fed. R. Evid. 801 rather than among the hearsay exceptions found in Fed. R. Evid. 803 and 804 as resting upon a judgment that "[n]o guarantee of trustworthiness is required in the case of an admission." *Id.* at 297.

Every witness who testified or submitted a statement during the congressional hearings that touched upon the co-conspirator rule assumed that it reflected the common law approach.<sup>10</sup> The late circuit judge, Henry J. Friendly, traveled to hearings in Washington to state his reservations about codification. In the process, he indicated his belief that Rule 801(d)(2)(E) did not change the co-conspirator rule or "advance matters," but predicted that the short statement of the rule would require that courts fill in the obvious gaps, which is exactly what they have done.<sup>11</sup>

It is inconceivable that the Advisory Committee, this Court or the Congress would have abandoned the inde-

<sup>10</sup> Senator McClellan, who was very influential in the final wording of the Federal Rules of Evidence, wrote to Judge Maris, indicating that he believed that the independent foundation was retained in Rule 801(d)(2)(E). Letter from Senator McClellan to Judge Maris, August 12, 1971, in Supplement to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 2d Sess., at 47, 57. Richard Keatinge and John Blanchard, who had experience with the California Evidence Code, submitted a lengthy analysis of the proposed Federal Rules, specifically concluding that the independent evidence requirement was codified, and citing *Glasser* and *Carbo*. Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 162. Herbert Semmel, representing a group of Washington, D.C. lawyers, submitted a lengthy analysis, specifically concluding that the rules would not affect the admissibility of co-conspirator statements. Senate Judiciary Comm. Hearings, at 318.

<sup>11</sup> House Subcomm. Hearings, *supra* note 10, at 249.

pendent evidence rule without ever mentioning such an important change and without ever correcting the understanding of the participants who believed that it was retained. Moreover, participants in the drafting process were undoubtedly aware of the fundamental principle of agency law, applicable in civil as well as criminal cases for many years, that is concisely stated in the ALI Restatement of the Law of Agency (Second) § 285 (1958):

Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by *other evidence* that the making of such statements was within the authority of the agent . . . . (Emphasis added)<sup>12</sup>

The Advisory Committee explicitly and clearly relied on agency theory in drafting the co-conspirator rule. One fundamental agency principle has been the independent evidence requirement. Nothing in the legislative history hints that a major departure from this principle was intended.

The circuits adhering to the independent evidence rule have written many opinions involving co-conspirator statements. They have expressed no concern that the rule limiting the trial judge to considering independent evidence in finding that a defendant was a member of a conspiracy along with a declarant has proved burdensome or has demonstrated the slightest unfairness to the government. They have read the language of the rule as assuming, according to the traditional approach and basic agency law, that a finding of conspiracy would precede the

<sup>12</sup> The Restatement also states in section 286 that apparent authority is simply not enough to warrant admitting an agent's statement.

determination whether a statement was made during and in furtherance of it. Every state court that has adopted a version of Rule 801(d)(2)(E) has required independent evidence when asked to state the standard of admissibility.<sup>13</sup>

### C. The Rule Against Bootstrapping Is A Necessary Protection For The Defendant

On one point, petitioner and respondent are in agreement: statements that are admissible as non-hearsay or under another hearsay exception may be considered by the judge who rules on the admissibility of co-conspirator statements. Countless cases so hold. This point underscores the fundamental importance of a rule that prohibits co-conspirator statements from lifting themselves into evidence without independent support. The only situation in which the independent evidence rule matters arises when the government's case is so weak that after all of the evidence admissible under other hearsay exceptions—i.e., state of mind statements, declarations against interest, business records, and personal admissions—is added to all of the admissible nonhearsay proof as to what alleged co-conspirators did (i.e., nonassertive acts), and

<sup>13</sup> For two years, the Litigation Section of the American Bar Association has examined the various state evidence codes adopted contemporaneously with or after the Federal Rules of Evidence. The study, *American Evidence Law*, will be published this summer. It concludes that although there has been a departure from the independent evidence standard in the two federal circuits, "[t]he states, however, appear uniformly to have adopted the independent evidence requirement. No reported state decision has rejected it." Chapter 56, at 43. The ABA Litigation Section has agreed to provide copies of this chapter to the Court and to respondent. To assure appropriate disclosure, petitioner notes that one of the authors of this Reply participated in the ABA study.

to this combination is added all of the admissible nonhearsay statements—warnings, threats, etc.—a trial judge still cannot conclude that it is more likely than not that a defendant was involved in a conspiracy.

Respondent refers to the “irrationality of the scheme proposed by petitioner.” Brief for Respondent, at 19. This pejorative label is hardly warranted, however. Petitioner merely submits that the traditional approach requiring independent evidence—the approach noted in *Glasser* and adopted by the great majority of federal circuits and by every state that has adopted rules—represents a fair and reasoned judgment that no person should be prosecuted on the basis of out-of-court statements by another when the government cannot muster enough proof to satisfy even a preponderance of the evidence test without using the other’s statements. Any other rule gives enormous power to individuals to implicate innocent third parties almost at will.<sup>14</sup>

<sup>14</sup> The proof *aliunde* requirement recognizes the ease with which one person can allege that others are involved in his or her activities. The same principle underlies the agency rule found in the ALI, Restatement of the Law of Agency (Second) § 285 (1958), discussed above. It signifies the wisdom of a rule that does not permit one person to impose liability upon another as a result of extra-judicial assertions which are so suspect that a reasonable trial judge would not conclude from all of the evidence other than the assertions themselves that it is more likely than not that the relationship described in the assertions actually existed. It is not enough to say that a trial judge will only admit co-conspirator statements that the judge believes. The judge might be inclined to credit statements when the defendant is unable to explain them. This is the dilemma of the defendant who was never part of a conspiracy. The defendant cannot explain statements that falsely implicate him, because he will not know why a declarant saw an advantage or had a motive in making reference to him.

## II. STATEMENTS ADMITTED UNDER THE CO-CONSPIRATOR RULE SHOULD PRESUMPTIVELY SATISFY THE CONFRONTATION CLAUSE PROVIDED THERE IS PROOF *ALIUNDE* OF CONSPIRACY, BUT UNIQUE CIRCUMSTANCES MAY WARRANT A CONFRONTATION ANALYSIS

### A. The Advisory Committee Expressly Left Open Confrontation Clause Attacks Upon Hearsay, And Congress Recognized This When It Adopted The Federal Rules Of Evidence

The Advisory Committee introduced Article VIII of the Federal Rules of Evidence, dealing with hearsay, with a “Special Introductory Note.” 56 F.R.D. at 288-92. One section, entitled “Confrontation and Due Process”, stated the Committee’s conclusion “that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas.” *Id.* at 292. It added that “[i]n recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rule 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.” *Id.* Although the Note does not specifically mention Rule 801 (d), it is clear on the face of this rule that the Committee adopted an identical approach in this rule. Like Rules 803 and 804, Rule 801 (d) states that certain statements are not classified as hearsay; the effect is to exempt them from the ban on hearsay evidence, but there is no affirmative provision for their admission into evidence.

The Advisory Committee’s intention not to insulate evidence falling within a hearsay exemption from Confrontation Clause attack was made clear in the language of

the rules, in its Note, and in testimony before Congress. The Committee's Reporter, Professor Cleary, testified that "these rules do not purport to deal with confrontation problems," and added with respect to one hearsay exception, "all that this rule would do would be in that situation to remove the hearsay objection, but it would leave the confrontation problem still to be decided."<sup>15</sup> In light of this history, the argument in the Brief for Respondent, at 37-38, that somehow the process of rule formulation insulates the Federal Rules from the Sixth Amendment stands the legislative history on its head.

**B. The Co-Conspirator Rule In Its Current Form Is Very Different From The Rule Originally Adopted, And Respondent Would Have The Court Broaden The Rule Once More**

Respondent is correct in observing that some forms of co-conspirator statements were admitted early in the history of Anglo-American evidence, but respondent utterly fails to discuss the ways in which the hearsay exception has broadened over time. The co-conspirator rule has grown as the doctrine of conspiracy has broadened, and it has demonstrated its own capacity for enlargement independent of the substantive law. The point is well illustrated by one of the cases respondent cites as establishing that the co-conspirator rule is firmly established. In *Krulewitch v. United States*, 336 U.S. 440 (1949), this Court reversed a defendant's convictions and rejected an

<sup>15</sup> House Subcomm. hearings, *supra* note 10, at 542. The legislative history also indicates that Congress amended the hearsay rules with this testimony in mind. For example, a sentence was dropped from Rule 804(b)(3) at the suggestion of Senator McClellan, Letter, *supra* note 10, at 60, who expressed the view that the sentence appeared to address a Confrontation Clause concern, and it was his understanding that such concerns were not addressed in the rules.

effort by the United States to expand the evidence rule admitting co-conspirator statements. Justice Black's opinion for the Court rejected the government's argument that a statement made in furtherance of an alleged, but uncharged, conspiracy aimed at preventing detection and punishment could be used against persons who had conspired with one another. Yet, since that decision, lower federal courts have held that statements made in furtherance of one conspiracy may be admitted as proof of a separate, independent conspiracy.<sup>16</sup>

Concurring in *Krulewitch*, Justice Jackson described the federal law of conspiracy as a "long evolution of that elastic, sprawling and pervasive offense." 336 U.S. at 445.<sup>17</sup> He noted then that "[a] recent tendency has appeared in this court to expand this elastic offense and to facilitate its proof." *Id.* at 451. His illustration was *Pinkerton v. United States*, 328 U.S. 640 (1946), which "sustained a conviction of a substantive crime where there was no substantive proof of participation in or knowledge of it, upon the novel and dubious theory that conspiracy is equivalent in law to abiding and abetting." 336 U.S. at 451.<sup>18</sup>

<sup>16</sup> *E.g.*, *United States v. Moosey*, 735 F.2d 633 (1st Cir. 1984); *Zenith Radio Corp. Matsushita Elec. Indus. Co.*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1348 (1986). See also *United States v. Gotti*, 644 F. Supp. 370 (E.D.N.Y. 1986) (sufficient for government to prove a defendant's participation in a larger conspiracy even if it cannot prove he was a member of the conspiracy alleged in the indictment).

<sup>17</sup> His opinion was joined by Justices Frankfurter and Murphy.

<sup>18</sup> This Court recognized in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), that the offense of conspiracy had "broadened to include more and more, in varying degrees of attachment to the confederation."

The United States has persuaded lower federal courts to read the co-conspirator exemption expansively. Decisions hold that the government need only prove a combination, not that it was for an unlawful purpose<sup>19</sup>; statements by one co-conspirator reporting what another supposedly said are admissible<sup>20</sup>; statements made before a defendant joined a conspiracy are admissible against that defendant<sup>21</sup>; and a declarant's statements may be admitted against a defendant even if the declarant lacked personal knowledge when he spoke.<sup>22</sup>

The current form of the conspiracy doctrine and the evidence rule provide a much broader basis for admissibility than could have been imagined when the Confrontation Clause was adopted. To hold that anything that is labeled a co-conspirator statement automatically escapes Confrontation Clause analysis is to ignore the myriad of circumstances surrounding co-conspirator statements. Respondent cannot claim that the current, expanded approach to admissibility is long-standing, for the expansion has been persistent, especially recently.

If the Court were to agree with respondent that a trial judge may rely upon co-conspirator statements in deciding that a defendant was a member of a conspiracy along with a declarant, petitioner submits that the effect of such a holding would be to alter dramatically the way in which co-conspirator statements have historically been handled

<sup>19</sup> See, e.g., *Government of Virgin Islands v. Braithwaite*, 782 F.2d 399 (3d Cir. 1986).

<sup>20</sup> See, e.g., *United States v. Womochil*, 778 F.2d 1311 (8th Cir. 1985).

<sup>21</sup> See, e.g., *United States v. Liefer*, 778 F.2d 1236 (7th Cir. 1985).

<sup>22</sup> See, e.g., *United States v. Ammar*, 714 F.2d 238 (3d Cir.), cert. denied, 464 U.S. 936 (1983).

in federal courts. Respondent's argument would strip from the defendant the proof *aliunde* protection and provide no substitute—e.g., the jury's second look or proof beyond a reasonable doubt. In the event this new rule is adopted, a Confrontation Clause analysis of all conspirator statements should be required.

**C. Respondent Has Exaggerated A Defendant's Opportunity To Impeach A Co-Conspirator And The Burden Of Permitting A Limited Confrontation Clause Analysis Of Co-Conspirator Statements**

Respondent asserts that there is no need for a trial judge ever to make a reliability determination since Fed. R. Evid. 806 enables a defendant to impeach a co-conspirator whose statement is offered. The assertion is greatly exaggerated. For example, Fed. R. Evid. 608 (b) bars extrinsic evidence of specific acts of misconduct. The rule may only be used when a declarant is present in court to testify, not when a nontestifying co-conspirator's statement is offered. Other rules that theoretically permit impeachment have been held not to do so in particular cases. In *United States v. Ammar*, 714 F.2d 238 (3d Cir.), cert. denied, 464 U.S. 936 (1983), for example, one defendant (Stillman) whose conviction rested largely on the extrajudicial co-conspirator statements of another defendant (Ammar) could not impeach Ammar with prior convictions, because the government successfully persuaded the lower courts that its interest in consolidating the cases for trial and the nontestifying Ammar's interest in avoiding the prejudice of the convictions took precedence over Stillman's impeachment needs.

Furthermore, last term's decision in *United States v. Inadi*, \_\_\_ U.S. \_\_\_ 106 S.Ct. 1121 (1986), signifies that the government may avoid the impeachment that often occurs through a successful cross-examination by with-

holding the co-conspirator statements prior to trial and surprising the defendant to assure that opportunities for cross-examination and impeachment are minimized, if not absolutely prevented. Even if defendants are aware of the alleged co-conspirators whose statements will be offered, those co-conspirators might require use immunity before they will testify and answer a defendant's questions. Thus far, the United States has successfully argued that it has no obligation to confer use immunity on a co-conspirator declarant. *See, e.g., United States v. Georgia Waste Systems, Inc.*, 731 F.2d 1580 (11th Cir. 1984).<sup>23</sup>

Respondent claims that no case has found co-conspirator statements to violate the Clause. Although this is untrue,<sup>24</sup> petitioner does not claim there will be many such cases. He contends that in some cases justice will only be done if trial judges and appellate courts are

---

<sup>23</sup> It is obvious that impeachment by showing a witness' bias, interest, inability to articulate facts clearly, memory problems, and sensory deficiencies is often dependent on an opportunity to produce the witness for evaluation by the trier of fact.

<sup>24</sup> In *United States v. Ordonez*, 737 F.2d 793, 802 (9th Cir. 1984), a trial judge found that evidence of various ledgers satisfied the evidence rule. The court of appeals reversed, finding that the government had not laid a proper foundation and declined to remand for further preliminary fact finding on the ground that the Confrontation Clause was violated when the statements were admitted even if the hearsay rule was satisfied. In *United States v. Mouzin*, 785 F.2d 682, 691 (9th Cir. 1986), the Court referred to *Ordonez* as a Confrontation Clause case, again declined to remand for additional preliminary fact finding, and held that admission of a computer printout seized during a search violated the Confrontation Clause even if it satisfied the evidence rule. Many other circuits have declined to review Confrontation Clause claims. Thus, they have had no opportunity to determine whether statements satisfying the evidence rule would fail a confrontation test.

entitled to enforce the Confrontation Clause. Under the approach suggested by petitioner, the burden of demonstrating unique circumstances warranting a special Sixth Amendment analysis must be borne by a defendant. The cases decided in circuits that have recognized the possible application of the Confrontation Clause to co-conspirator statements demonstrate that, except in the few cases in which the courts have found the confrontation issue to be extremely strong in light of the defendant's specific confrontation claim, the lower courts have disposed of the confrontation claims quickly and with no apparent difficulty.

### CONCLUSION

For the reasons stated in petitioner's opening and this reply brief, petitioner asks that this Court reverse the judgment of the court of appeals and either remand for reconsideration of the admissibility of the co-conspirator statements or hold that there simply was no evidence of

conspiracy other than co-conspirator statements which should not have been admitted against him.<sup>25</sup>

Respectfully submitted,

JAMES R. WILLIS

*(Counsel of Record)*

Suite 610, Bond Court Building

1300 East Ninth Street

Cleveland, OH 44114

(216) 523-1100

JAMES M. SELLOW

SELLOW, SELLOW & GLYNN, S.C.

222 East Mason Street

Milwaukee, WI 53202

(414) 271-8535

STEPHEN ALLAN SALTZBURG

University of Virginia

School of Law

Charlottesville, VA 22901

(804) 924-3520

*Counsel for Petitioner*

---

<sup>25</sup> The record is devoid of evidence to hint, let alone prove, that petitioner had any relationship with Lonardo aside from Lonardo's placement of cocaine in petitioner's car on a single occasion. Respondent has conceded that no conspiracy can be based upon a single purchase-sale transaction. Brief in Opposition to Petition for Certiorari, at 5 n.4. From his conversations with Greathouse, it appears possible that Lonardo might have had ongoing relationships with others, but there is nothing to imply that he had any conspiratorial relationship with petitioner, and Lonardo's state of mind is irrelevant to a charge against petitioner. Respondent confuses evidence of the substantive offense that was charged with evidence of conspiracy. Nothing that occurred on the one occasion that Lonardo had any contact with petitioner supports a conspiracy allegation. Without the taped conversations between Lonardo and Greathouse, which the trial judge permitted the jury to use against petitioner, there would have been no evidence at all to support a conspiracy count against petitioner and no basis for admitting the conversations against petitioner.